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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,
JEREMY DAVIS, CHRISTOPHER
CASTILLO, and MONIQUE TRUJILLO
individually and on behalf of all other similarly
situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

CASE NO.: 4:20-cv-03664-YGR-SVK

**[PROPOSED] DENYING DEFENDANT'S
MOTION TO EXCLUDE OPINIONS OF
PLAINTIFFS' EXPERT DAVID NELSON**

The Honorable Yvonne Gonzalez Rogers

Courtroom 1 – 4th Floor

Date: September 20, 2022

Time: 2:00 p.m.

1 Before the Court is Defendant's Motion to Exclude Opinions of Plaintiffs' Expert David
 2 Nelson (Dkt. 663, "Defendant's Motion"). Having considered the parties' papers filed in support
 3 of and in opposition to Defendant's Motion, and all other matters properly considered by this
 4 Court, the Court **DENIES** Defendant's Motion.

5 "An expert should be permitted to testify if the proponent demonstrates that: (i) the expert
 6 is qualified; (ii) the evidence is relevant to the suit; and (iii) the evidence is reliable. *Otto v.*
 7 *LeMahieu*, No. 4:19-cv-00054-YGR, 2021 WL 1615311, at *1 (N.D. Cal. Apr. 26, 2021) (citing
 8 *Thompson v. Whirlpool Corp.*, 2008 WL 2063549, at *3 (W.D. Wash. 2008)); *see also Perez v.*
 9 *Rash Curtis & Assocs.*, No. 16-cv-03396-YGR, 2019 WL 1491694, at *3 (N.D. Cal. Apr. 4,
 10 2019). The "*Daubert* factors (peer review, publication, potential error rate, etc.) simply are not
 11 applicable to [non-scientific] testimony, whose reliability depends heavily on the knowledge and
 12 experience of the expert, rather than the methodology or theory behind it." *AngioScore, Inc. v.*
 13 *TriReme Medical, Inc.*, 87 F. Supp. 3d 986, 1015–16 (N.D. Cal. 2015) (Gonzalez Rogers, J.)
 14 (citing *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000) (finding that some *Daubert*
 15 factors do not apply to police officer's testimony based on 21 years of experience working
 16 undercover)), *rev'd on other grounds*, 666 Fed.Appx. 884 (Fed. Cir. 2016). The trial court acts
 17 as a "gatekeeper," excluding "junk science" that does not meet the standards of reliability
 18 required under Rule 702. *General Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997); *see also Kennedy*
 19 *v. Collagen Corp.*, 161 F.3d 1226, 1229–30 (9th Cir. 1998). This Court's Standing Order in Civil
 20 Cases makes clear that "issues going to the weight and credibility to be given to a report are not
 21 proper bases to bring a *Daubert* motion." Standing Order § 11.

22 At the class certification stage, the court "does not make an ultimate determination of
 23 the admissibility" of the expert testimony and "considers only whether the expert evidence is
 24 useful in evaluating whether class certification requirements have been met." *In re Lithium Ion*
 25 *Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2017 WL 1391491, at *6 (N.D. Cal. Apr. 12,
 26 2017); *see also Stathakos v. Columbia Sportswear Co.*, 15-CV-04543-YGR, 2017 WL
 27 1957063, at *3 (N.D. Cal. May 11, 2017) (noting that "[a]t this early stage, robust gatekeeping

of expert evidence is not required”) (internal quotation marks and citations omitted). Thus, the inquiry becomes “a tailored *Daubert* analysis which scrutinizes the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence.” *Id.* (internal quotation marks and citations omitted).

Here, Google seeks to exclude the entirety of Mr. Nelson’s opinions and testimony. Google, however, has not shown that that exclusion is warranted.

Mr. Nelson is qualified to provide expert testimony. “The threshold for qualifications is low; a minimal foundation of knowledge, skill, and experience suffices.” *In re PFA Ins. Mktg. Litig.*, 2021 WL 5994908, at *4 (N.D. Cal. Nov. 3, 2021) (Gonzalez Rogers, J.). Decades of experience working in the relevant industry and “familiarity with norms and best practices therein” is sufficient. *Id.*; *see also Stathakos*, 2017 WL 1957063, at *4 (expert was qualified “[b]ased on her extensive experience in the [] industry”). Google does not appear to challenge whether Mr. Nelson is qualified. However, given Mr. Nelson’s extensive experience with the FBI, with approximately 18 years investigating cyber crime, which involved submitting requests to Google based on IP address and date range, receiving and reviewing that information from Google, and using that information in furtherance of his investigations (including identifying individuals), the Court finds Mr. Nelson is qualified to provide expert testimony.

Mr. Nelson’s expert testimony is relevant to this litigation. The “relevancy bar is low, demanding only that the evidence ‘logically advance[] a material aspect of the proposing party’s case.’” *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995)). “Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry.” *City of Pomona v. SQM N.A. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014) (quoting *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010)). Similarly, Google does not appear to challenge the relevance of Mr. Nelson’s testimony. Nevertheless, Mr. Nelson’s testimony is relevant because it concerns how Google saves, collects, and uses private browsing data.

Mr. Nelson’s expert testimony is plainly reliable and not speculative. “[T]he test of

1 reliability is ‘flexible,’ and *Daubert*’s list of specific factors neither necessarily nor exclusively
 2 applies to all experts or in every case. Rather, the law grants a district court the same broad
 3 latitude when it decides how to determine reliability as it enjoys in respect to its ultimate
 4 reliability determination.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–48 (1999).
 5 Reliability is met when “sufficient assurances of trustworthiness are present that the expert
 6 witness’ explanative theory produced a correct result to warrant jury acceptance, *i.e.*, a product
 7 of reliable principles and methods.” *Stathakos*, 2017 WL 1957063, at *2. “Under Rule 703,
 8 expert opinion may be based on three possible sources: firsthand knowledge; admitted evidence;
 9 and facts or data not otherwise admitted, if they are the kind of information on which experts in
 10 the particular field reasonably would rely in forming opinions on the subject.” *Id.* at *3.

11 The cases Google relies on are unavailing. Despite Google’s representations, upon a
 12 review of the deposition transcript it is clear that Mr. Nelson provided details about his training,
 13 experience, and investigations during his time with the FBI. He described the process for
 14 submitting requests to Google, receiving the responsive information, and how he would use that
 15 to further his investigations. When asked for details that would reveal the subjects or victims,
 16 Mr. Nelson did invoke confidentiality, but the other details, taken as a whole, meet the test for
 17 reliability.

18 Google’s Motion to Exclude Opinions of Plaintiffs’ Expert David Nelson is **DENIED**.
 19 **IT IS SO ORDERED.**

20 DATED: _____

21 _____
 22 Honorable Yvonne Gonzalez Rogers
 23 United States District Judge
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